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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 683

HON. RICHARD H. ICHORD, et al.,

Petitioners,

vs.

JEREMIAH STAMLER, M.D., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents pray that the Petition for Writ of Certiorari be denied.

QUESTION PRESENTED

Whether the Court of Appeals was correct in holding that the claim against the Attorney General and the United States Attorney is not barred by the Speech or Debate Clause.

STATEMENT OF THE CASE

Petitioners' statement is in the main accurate, but incomplete.* The following pertinent facts are omitted:

* Petitioners' reference to an "amended complaint" is unclear, as no such pleading has been filed. (Petition, p. 7.)

(1) In 1967, after the Court of Appeals for the Seventh Circuit denied a petition for rehearing *en banc* of its reversal of Judge Hoffman's original order of dismissal, petitioners chose not to seek review in this Court. (2R. 4A.)*

(2) Before respondents were indicted in July, 1967, they sought to add the Attorney General and the United States Attorney for the Northern District of Illinois as defendants and to enjoin initiation of the prosecutions. (3R. 11-13.)

(3) Judge Julius J. Hoffman, the only then available member of the three-judge court, denied both the requested injunctive relief and leave to add the prosecutors as parties. (The latter ruling was subsequently overruled by the entire three-judge court after indictments had been returned.) (3R. 18-19, 21.)

(4) Within hours after Judge Hoffman's denial of a temporary restraining order against commencement of the prosecutions, petitioners secured return of the indictments from the grand jury although they had been notified that respondents were at that moment seeking to obtain further relief from this Court. (3R. 23-26.)

(5) The three-judge court granted respondents leave to supplement the complaint with allegations that the threatened prosecutions constituted harassment and intimidation of respondents in violation of First Amendment rights. (4R. 50.)

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* ..... R. ..... refers to the volume and item number of the record filed in this Court.

(6) Prior to filing answers in December, 1967, and January, 1968, petitioners presented a lengthy motion to dismiss the complaint. Petitioners did not rely upon the Speech or Debate Clause. The motion was unanimously denied by the three-judge court. (3R. 31; 4R. 52.)

(7) Petitioners' answers to the complaint did not refer to the Speech or Debate Clause. (4R. 56; 5R. 68.)

(8) The three-judge court denied respondents' discovery requests in substantial part. (5R. 85.)

Petitioners distort the opinion of the Court of Appeals as to which review is sought. (Petition, p. 11.) Respondents refer the Court to the opinion itself. (Appendix A to the Petition.)

REASONS FOR DENYING THE WRIT

Introduction

The holding of the Court of Appeals in reversing dismissal of the complaint as to the Attorney General and the United States Attorney for the Northern District of Illinois is in compliance with *Powell* v. *McCormack*, 395 U.S. 486 (1969), and *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967). In its present posture, this case tenders no issues which have not been resolved by this Court in its well-considered opinions in those cases.

The trial of this cause has been postponed for over four years. Two orders of dismissal in the District Court have been reversed by the Court of Appeals. After decision on the merits, review is likely to be sought in this Court. Petitioners in substance seek interlocutory review which can only serve further to delay respondents' efforts to reach the merits.

I.

RESPONDENTS' CASE IS REAL, IMMEDIATE, AND CONCRETE

Respondents' challenge to the Committee is hardly abstract. (See Petition, pp. 16-17, 19.) Respondents were indicted in July, 1967, after their emergency motion for injunctive relief against commencement of the prosecutions was denied. Petitioners have repeatedly pressed for a trial on these indictments. Witnesses who appeared before the Committee at subsequent hearings and refused

to testify on First Amendment grounds have not been criminally prosecuted.* (See *Krebs* v. *Ashbrook,* Civ. No. 2157-66 D.D.C., dismissed April 1, 1969; *Young* v. *Willis* Civ. Nos. 2441-68 and 2445-68 D.D.C., dismissed June 26, 1969.) Petitioners have singled out respondents for punishment, and yet have the temerity to assert that respondents' case is hypothetical.**

Following the indictments, Doctor Stamler was swiftly placed on inactive status as Director of the Division of Adult Health and Aging of the Chicago Board of Health and as Director of the Board's Heart Disease Control Program.***

Golden v. *Zwickler,* 394 U.S. 103 (1969), upon which petitioners rely, presents a sharp contrast. Zwickler's 1964 conviction for violating the challenged state statute

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*Respondents' complaint, as supplemented, alleges that the prosecutions of respondents were instituted to intimidate and harass respondents in violation of First Amendment rights.

**During a recent hearing on cigarette labeling and advertising before the Committee on Interstate and Foreign Commerce of the House of Representatives, Petitioner Albert Watson, Representative from South Carolina, inquired of a witness who had cited Dr. Stamler's research linking cigarette use and heart disease, as follows:

> "Mr. Watson: Not for the purpose of discrediting Dr. Stamler, but is he the same Dr. Stamler who is under indictment now for contempt of Congress, the gentleman from Chicago?" (Hearings Before the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess., ser. 91-11, pt. 2 at 526 (1969).

***See Second Supplement to Complaint for other allegations of direct, immediate, and continuing harm to respondents because of the indictments. (3R. 34.)

had been reversed before his complaint was filed, and no such prosecution had been initiated or threatened for his subsequent activities. This case more than meets the requirement of the Court in *Golden* v. *Zwickler* that the constitutional question "must be presented in the context of a specific live grievance." 394 U.S. at 110.

II.

THE ISSUES SUGGESTED BY PETITIONERS ARE EITHER HYPOTHETICAL OR RESOLVED BY PRIOR RULINGS OF THIS COURT

While baselessly castigating respondents for presenting "abstract" issues, petitioners tender questions to this Court based solely upon their "assumptions" about the future course of this case after remand. (Petition, pp. 11-12, fn. 7.) Whether respondents *might* amend their complaint, whether developments *might* make additional parties necessary, as permitted by the Court of Appeals, to "accord complete relief," whether declaratory or injunctive relief *might* be sought against the reconstituted Committee, are matters that must await proceedings on remand.

Golden v. *Zwickler*, 394 U.S. 103 (1969), reaffirmed the salutory principle that this Court should avoid constitutional questions not tendered by the record in a case before it.* It is petitioners who urge rejection of those strictures. They urge this Court to review issues which are not now present and which are likely never to arise.

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* See also the dissenting opinion in *Jenkins* v. *McKeithen*, 395 U.S. 411, 433 (1969).

When the Court of Appeals originally reversed Judge Hoffman's order dismissing the complaint (371 F.2d 413), petitioners did not seek review in this Court. Petitioners do not appear to deny the validity of respondents' complaint against the Committee prior to the amendment of Rule XI earlier this year. They now argue, however, that the Committee's *post litem motem* efforts to refurbish its image deprives the court of jurisdiction. Surely, parties having justiciable claims against First Amendment violations do not lose standing simply because the offending agency presents a moving target.

In any event, the legal consequences of changes in the Committee's charter are not now before this Court.

The issue tendered in the present posture of this case is not of general significance. The only question now before this Court is whether the Court of Appeals properly interpreted the rulings of this Court in *Powell* v. *McCormack*, 395 U.S. 486 (1969), and *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967). This Court held in those cases that employees of the Congress cannot take shelter behind the Speech or Debate Clause. It must follow that the Clause does not shelter officers of the executive branch, who generally are subject to injunctive suits against enforcement of unconstitutional statutes, including criminal statutes. There can be little doubt that the District Court erred in dismissing the prosecutor-petitioners as "ancillary." No new or significant issue is tendered by petitioners at this time.

CONCLUSION

Respondents respectfully pray that the Petition for a Writ of Certiorari be denied, but if this Court grants the instant petition, respondents respectfully suggest that it should decide the case on its merits and rule whether or not Rule XI of the House of Representatives upon which respondents' subpoenaes were based violates the Constitution.

Respectfully submitted,

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